

BRAD D. BRIAN (State Bar No. 79001)  
brad.brian@mto.com

BETHANY W. KRISTOVICH (State Bar No. 241891)  
bethany.kristovich@mto.com

ANNE K. CONLEY (State Bar No. 307952)  
Anne.Conley@mto.com

MUNGER, TOLLES & OLSON LLP  
350 South Grand Avenue, Fiftieth Floor  
Los Angeles, California 90071-3426  
Telephone: (213) 683-9100  
Facsimile: (213) 687-3702

*Attorneys for Plaintiff MICHAEL Z.  
HERMALYN*

Michael B. Carlinsky (*pro hac vice forthcoming*)  
michaelcarlinsky@quinnemanuel.com  
QUINN EMANUEL URQUHART & SULLIVAN, LLP  
51 Madison Ave, 22nd Floor  
New York, New York 10010  
Telephone: (212) 849-7000  
Facsimile: (212) 849-7100

David C. Armillei (SBN 284267)  
davidarmillei@quinnemanuel.com  
QUINN EMANUEL URQUHART & SULLIVAN, LLP  
865 South Figueroa Street, 10th Floor  
Los Angeles, California 90017-2543  
Telephone: (213) 443-3000  
Facsimile: (213) 443-3100

*Attorneys for Plaintiff  
FVP, LLC*

# UNITED STATES DISTRICT COURT

## CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

Michael Z. Hermalyn and FVP, LLC,

Plaintiffs,

vs.

DraftKings, Inc.,

Defendant.

Case No. 2:24-cv-00918

### **PLAINTIFFS' EX PARTE APPLICATION FOR ORDER SHORTENING TIME FOR HEARING ON PLAINTIFFS' MOTION TO REMAND**

*[Filed concurrently with Kristovich  
Declaration; [Proposed] Order]*

Date: February 5, 2024

Time: 9:00 a.m.

Judge: Hon. Mark C. Scarsi

Courtroom: 7C

Trial Date: None Set

1 **TO THE COURT, ALL PARTIES, AND ALL ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that Plaintiffs MICHAEL Z. HERMALYN and  
3 FVP, LLC (collectively, “Plaintiffs”) hereby apply *ex parte* for an Order Shortening  
4 Time for a hearing on their Motion to Remand this action to California Superior  
5 Court, and respectfully request that their Motion to Remand be heard by this Court  
6 on **Monday, February 5, 2024, at 9:00 a.m.**

7 This Application is based on the Application itself; the attached  
8 Memorandum of Points and Authorities in support thereof; the Declaration of  
9 Bethany W. Kristovich; all papers and pleadings on file herein; and such further  
10 evidence and argument as may be presented to the Court.

11 Pursuant to Local Rule 7-19, Plaintiff’s counsel gave DraftKings notice of  
12 this *Ex Parte* Application on February 2, 2024, at 11:58 a.m., and requested that  
13 DraftKings advise whether and on what basis it would oppose the requested relief.  
14 See Declaration of Bethany W. Kristovich (“Kristovich Decl.”) ¶¶ 2-3 & Ex. A.  
15 Plaintiff’s counsel attempted to contact DraftKings’ counsel by email and telephone.  
16 *Id.* ¶ 3. DraftKings has not stated its position with respect to the relief sought.

17 The names, addresses, telephone numbers, and email addresses of  
18 DraftKings’ counsel are as follows:

- 19 • Gibson, Dunn & Crutcher LLP, 333 S. Grand Ave., Los Angeles, CA 90071
- 20 • Katherine V.A. Smith - [ksmith@gibsondunn.com](mailto:ksmith@gibsondunn.com); 213-229-7107
- 21 • James P. Fogelman - [jfogelman@gibsondunn.com](mailto:jfogelman@gibsondunn.com); 213-229-7234
- 22 • Orin Snyder – [osnyder@gibsondunn.com](mailto:osnyder@gibsondunn.com); 917-238-3977

24 DATED: February 2, 2024

MUNGER, TOLLES & OLSON LLP

25 By: /s/ Brad D. Brian

26 BRAD D. BRIAN

27 Attorneys for Plaintiff

28 MICHAEL Z. HERMALYN

## MEMORANDUM OF POINT AND AUTHORITIES

The hearing of this motion on shortened time is necessary because Defendant DraftKings, Inc.’s (“DraftKings”) improper removal—filed in the face of Mr. Hermalyn’s efforts to seek a temporary restraining order (“TRO”) in state court—is designed to (i) avoid recent, governing California state law that renders unenforceable the restrictive covenants and foreign law/forum provisions at issue; and (ii) buy DraftKings time to seek a TRO in Massachusetts to enforce these void contractual provisions against a California resident and employee in violation of California law. DraftKings should not be permitted to utilize an improper removal to deprive the California state courts of its jurisdiction, stall Plaintiffs’ first-filed California proceedings, gain strategic advantage in DraftKings’ anticipated Massachusetts proceedings, and ultimately prevent Mr. Hermalyn from pursuing employment that is protected by California law.

Mr. Hermalyn recently left DraftKings and moved to California to accept an offer of employment with Plaintiff FVP, LLC (“Fanatics VIP”), a California-based affiliate of the digital sports platform Fanatics Holdings, Inc. (together with its subsidiaries and affiliates, including Fanatics VIP, “Fanatics”). ECF No. 1-5 (Hermalyn Decl.) ¶¶ 2-4. As the President of Fanatics VIP and the Head of Fanatics’ Los Angeles, California office, Mr. Hermalyn lives and works in Los Angeles, where Fanatics already employs approximately 80 individuals. *Id.* ¶¶ 5-7.

While Mr. Hermalyn was employed with DraftKings, he lived in New Jersey and worked remotely or in DraftKings’ New York office. *Id.* ¶¶ 8-9. DraftKings presented Mr. Hermalyn with several contracts containing broad, onerous one-year post-termination non-compete, employee non-solicitation, and client non-solicitation provisions as a condition of his employment. *Id.* ¶¶ 12-16 & Exs. A & B. Although Mr. Hermalyn never lived or worked in Massachusetts, those agreements purport to be governed by Massachusetts law and to require certain litigation in Massachusetts. *Id.*

1       The California Legislature, with the passage of legislation, made clear that it  
2 would preclude enforcement of restrictive covenants against its residents regardless  
3 of such forum clauses or where and when the contract was signed. Bus. & Prof.  
4 Code § 16600.5. Specifically, California’s recently enacted law (effective January  
5 1, 2024) grants California residents a private right of action to enjoin enforcement of  
6 restrictive covenants, *even if signed outside of California while working for a non-*  
7 *California employer*. The legislative history demonstrates that the new law was  
8 intended to encourage individuals to move to California and to give them the right to  
9 sue both: (a) to invalidate restrictive covenants; and (b) to enjoin the former  
10 employer from suing outside California to enforce such covenants.

11       As a California resident and employee, Mr. Hermalyn availed himself of this  
12 new express protection, filing suit yesterday in California state court, together with  
13 Fanatics VIP, claims for declaratory judgment, violation of Section 16600.5, and  
14 unfair competition. ECF No. 1-3 (Complaint). Mr. Hermalyn also sought a TRO to  
15 enjoin DraftKings from seeking to enforce the illegal restraints on trade by suing in  
16 Massachusetts. ECF No. 1-4 (Ex Parte Application for TRO). Mere hours before  
17 that TRO could be heard today, DraftKings rushed to remove to this court on the  
18 purported basis of diversity jurisdiction. ECF No. 1 (Notice of Removal). But  
19 DraftKings’ hasty removal is baseless. Because one of the two plaintiffs, Fanatics  
20 VIP, has a Nevada corporation as its sole member, there is no diversity between  
21 Plaintiffs and DraftKings, which is also incorporated in Nevada. Absent complete  
22 diversity between the parties, this Court does not have jurisdiction, as set forth more  
23 fully in the concurrently-filed Motion to Remand.

24       DraftKings’ improper actions are interfering with Mr. Hermalyn’s rights  
25 under California law to pursue his chosen profession in California and Fanatics  
26 VIP’s ability to expand and innovate its California operations. Because DraftKings  
27 apparently intends to file suit in Massachusetts imminently in an attempt to subvert  
28 clear California law and undercut a perceived competitor, Plaintiffs need their

1 remand motion to be heard on an expedited basis so that Mr. Hermalyn can pursue  
 2 his TRO in California state court. On that basis, Plaintiffs respectfully request that  
 3 the Court expedite their concurrently-filed motion to remand to be heard on  
 4 **Monday, February 5, 2024.**

5 Policing vexatious removal *swiftly* is needed to dissuade abuse of the removal  
 6 process, especially when removals are effectuated only to inject delay. *See, e.g.,*  
 7 *U.S. Bank, Nat'l Ass'n as Tr. for Truman 2016 SC6 Title Tr. v. Bonde*, No. 19-CV-  
 8 08464-JCS, 2020 WL 536024, at \*1 (N.D. Cal. Jan. 9, 2020), *report and*  
 9 *recommendation adopted*, No. 19-CV-08464-PJH, 2020 WL 533019 (N.D. Cal. Feb.  
 10 3, 2020) (*sua sponte* remanding case because removal was improper). Courts “have  
 11 recognized that *ex parte* applications are appropriate where, among other  
 12 circumstances, there is a threat of immediate or irreparable injury, and have granted  
 13 such applications to remand where subject matter jurisdiction is lacking.” *Ballard v.*  
 14 *Ameron Int'l Corp.*, No. 16-CV-06074-JSC, 2016 WL 6216194, at \*2 (N.D. Cal.  
 15 Oct. 25, 2016) (granting *ex parte* application to hear request for remand on an  
 16 expedited basis).

17 Accordingly, courts have routinely granted plaintiffs’ *ex parte* applications to  
 18 remand where removal was improper, as is the case here. *See, e.g., Colfin AI-CA4*  
 19 *LLC v. Clark*, No. EDCV 13-1162-CAS (SPx), 2013 WL 3967656, \*1-2 (C.D. Cal.  
 20 Aug. 1, 2013) (granting plaintiff’s *ex parte* application to remand to state court  
 21 because defendant’s removal was untimely and the court lacked subject matter  
 22 jurisdiction); *Fed. Nat'l Mortg. Ass'n v. Bravo*, No. CV 12-10375-CAS-(Ex), 2013  
 23 WL 210198, \*1 (C.D. Cal. Jan. 17, 2013) (granting plaintiff’s *ex parte* application to  
 24 remand to state court because the court lacked subject matter jurisdiction); *U.S.*  
 25 *Bank Nat'l Ass'n v. Gutierrez Hernandez*, No. SACV 10-01508-CJC (MLGx),  
 26 2010 WL 4054451, \*2 (C.D. Cal. Oct. 14, 2010) (same); *No Doubt v. Activision*  
 27 *Publ'g, Inc.*, 702 F. Supp. 2d 1139, 1147 (C.D. Cal. 2010) (granting plaintiff’s *ex*  
 28 *parte* application to remand to state court because claims not preempted by federal

1 law); *Rafiqzada v. U.S. Bank Nat'l Ass'n*, No. C 02-3316 SI, 2002 WL 31430319, at  
2 \*1 (N.D. Cal. Oct. 29, 2002) (granting plaintiff's *ex parte* application to remand to  
3 state court because defendant's removal was untimely); *Wilson v. Asbestos*  
4 *Defendants (BHC)*, No C 01-1015 CRB, 2001 WL 348975, at \*1 (N.D. Cal. Mar.  
5 29, 2001) (granting plaintiff's *ex parte* application to remand based on lack of  
6 diversity).

7  
8 DATED: February 2, 2024

Respectfully submitted,

9  
10 MUNGER, TOLLES & OLSON LLP

11  
12 By: /s/ Brad D. Brian

13 BRAD D. BRIAN

14 BETHANY W. KRISTOVICH

15 ANNE K. CONLEY

16 *Attorneys for Plaintiff*

MICHAEL Z. HERMALYN

17  
18 QUINN EMANUEL URQUHART &  
SULLIVAN, LLP

19  
20 By: /s/ Michael B. Carlinsky

21 MICHAEL B. CARLINSKY<sup>1</sup>

22 DAVID C. ARMILLEI

23 *Attorneys for Plaintiff*

24 FVP, LLC

25  
26  
27 <sup>1</sup> Signed electronically by Brad D. Brian with the concurrence of Michael B.  
28 Carlinsky, pursuant to L.R. 5-1(i)(3).

**Local Rule 11-6.1 Certificate of Compliance**

The undersigned, counsel of record for Michael Z. Hermalyn, certifies that this brief contains 1,043 words, which complies with the word limit of L.R. 11-6.1.

DATED: February 2, 2024

MUNGER, TOLLES & OLSON LLP

By: /s/ Brad D. Brian

BRAD D. BRIAN

*Attorneys for Plaintiff*

MICHAEL Z. HERMALYN